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In the Supreme Court of the United States

OCTOBER TERM, 1986

CAROLYN KING PALERMO,

Petitioner,

vs.

DEWAYNE ROREX, JACK CHIVATERO, AND CHARLES HOYLE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Are federal civilian supervisory employees of the IRS absolutely immune from personal liability for an intentional constitutional and common law tort committed against a co-employee that results in his wrongful death?

2. Have plaintiff-decedent and his spouse been deprived of personal and property interests without due process of law?

3. When there are no alternative administrative remedies available to either the deceased spouse or his survivors to redress the harm and compensate the loss, can it be fairly said that there are any special factors counseling hesitation in the recognition of a remedy?

4. Is *Bush v. Lucas* distinguishable from the instant case because Mr. Palermo's death foreclosed his and his survivor's administrative remedies?

5. Is there a conflict in the Circuits concerning the applicability of absolute or qualified immunity for federal supervisory employees?

LIST OF PARTIES

Carolyn King Palermo
Dewayne Rorex
Jack Chivatero
Charles Hoyle

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Petitioner Carolyn King Palermo, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 5, 1987, and for which rehearing was denied February 17, 1987.

OPINIONS BELOW

The opinion of the court of Appeals for the Fifth Circuit is reported at 806 F.2d 1266 (5th Cir. 1987) and is reproduced as Appendix A, App. 1. The federal District

Court for the Eastern Distsrict of Louisiana granted defendants' motion to dismiss February 14, 1985. (App. B, App. 18). The district Court did not issue a published opinion. The Court of Appeals for the Fifth Circuit denied rehearing and rehearing en banc on February 17, 1987. (Appendix C, App. 20).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered January 5, 1987. The denial of petitioner's request for rehearing en banc was entered February 17, 1987. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Carolyn King Palermo is the widow of Dwayne Joseph Palermo, a former employee of the Internal Revenue Service with many years of service to that agency. She filed suit in the Civil Distsrict Court of the Parish of Orleans and in the United States District Court for the Eastern District of Louisiana against individually named defendent employees of the United States Government for the wrongful death of her husband. Her federal suit alleged his wrongful death constituted a violation of the Fifth Amendment. Neither the United States nor any agency was named a defendant in these actions. The state court case was removed and consolidated with the Federal case. Petitioner's motion to remand was denied by the district court.

Mrs. Palermo has alleged that the individually named defendants in this case intentionally inflicted severe emotional distress upon her husband by various acts of harassement and wrongful disciplinary proceedings at a time when they were fully aware of his precarious emotional state. Indeed, disciplinary proceeding previously initiated by defendants were withdrawn when Mr. Palermo's psychiatrist reported the seriousness of Mr. Palremo's problems to them. These proceedings were subsequently recommenced by defendants shortly before took he his own life on October 3, 1983.

While the allegations of intentional infliction of emotional distress as a substantial contributing cause of Mr. Palermo's suicide were accepted as true in the court of appeal's review of the district court's motion to dismiss, it should be noted that ample medical and factual evidence

was developed to support these allegations.

The District Court granted defendants' motion to dismiss February 14, 1985.

The Court of Appeals affirmed. *Palermo v. Rorex*, 806 F.2d 1266, 1270 (5th Cir. 1987). The Court of Appeals omitted important facts in its opinion, discussed herein, which go directly to the heart of whether or not these defendants should be entitled to absolute immunity.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals, In Conflict with Applicable Decisions of This Court and Its Own Precedent, Extended Absolute Immunity to Federal Supervisory Employees of the IRS Who Were Charged Personally With Committing a Fatal Constitutional and Common Law Intentional Emotional Tort.

The Fifth Circuit Court of Appeals has extended absolute immunity for personal liability to a catagory of federal supervisory employees for constitutional and common law torts which took place well beyond the outer limits of their lawful authority. Although this case involves a non-physical assault, (the intentional infliction of emotional distress on a subordinate) the damage inflicted could not be more severe. As a result of the deliberate and malicious acts of defendant, Mr. Palermo was driven to suicide.

The defense of absolute immunity should not be available to these defendants given the compelling facts

and circumstances of this case and the needs of our system of justice to protect both the injured and the accused. Mr. Palermo has lost his life. Mrs Palermo has lost her husband and the largest part of her support without either due process or any mechanism for correcting the harm. USCA Constitution Amendment 5. It is well settled that Constitutional torts are actionable in federal court. The defense of absolute immunity is sparingly granted. *Barr v. Matteo,* 360 U.S. 564, 79 Sup. Ct. 1335, 3 L.Ed. 2d 1434 (1959); *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 91 Sup. Ct. 1999, 29 L.Ed. 2d 619 (1971); *Butz v. Economu,* 438 U.S. 478, 98 Sup. Cts. 2894, 57 L.Ed. 2d 895 (1978); *Davis v. Passman,* 442 U.S. 228, 99 Sup. Ct. 2264, 60 L. Ed. 2d 864)1979); *Carlson v. Green,* 446 U.S. 14, 100 Sup. Ct. 1468, 64 L.Ed. 2d 15 (1980). Mr. Palermo's wrongful death is also an actionable tort under Louisiana law. Louisiana Civil Code Article 2315.

This Court has consistently held that absolute immunity is available only to a very limited category of high government officials. *Mitchell v. Forsyth,* 105 S.Ct. 2806 (1985). In *Bush v. Lucas,* 103 S.Ct. 2404 (1985), a remedy for a violation of the First Amendment was denied because the plaintiff was able to pursue administrative and civil service claims. Mr. Palermo has no such remedies available to him.

The Fifth Circuit has also failed to follow its own precedent. In *Dretar v. Smith*, 752 F. 2d 1015 (5 Cir. 1985), the court correctly held that a federal employee's interest in protection from assaults by federal officials outweighs any public interest in shielding government officials from defending damage suits brought on account of action taken in the exercise of the official's duties when: the injury is

severe, the action grossly disproportionate to the need under the circumstances and is inspired by malice. The opinion in *Palermo* is inconsistent with the Fifth Circuit precedent of both *Dretar* and *Shillingford v. Holmes*, 634 F2d 263, 265 (5th Cir. *1985*). Accepting the allegations of the complaint as true, this case certainly presents a severe harm, a wrongful death, resulting from malicious acts that were grossly disproportionate to the need under the circumstances and maliciously motivated. There is no just reason to distinguish between emotional and physicial assaults when the *Dretar* criteria of severity, disproportionality and malice are met. The Fifth Circuit ignored its own precedent in the instant case.

a. No Administrative Remedies Exist to Provide Redress For This Claim.

Utterly lacking from the Fifth Circuit's opinion is an answer to the question, what administrative avenues exist to redress this claim which justify the extension of absolute immunity to the defendants? Mr. Palermo is gone. The "extensive grievance procedure" referred to by the court cannot be pursued by one who is dead, nor his heirs. Nor can it be invoked before the cause of action arises. It begs the question whether or not Mr. Palermo could have pursued any administrative remedy when he lived. This claim did not arise until he died. To suggest this mentally disturbed individual failed to take rational steps when he was irrational, to prophecy and avert his own suicide or to correct his problem before it killed him by making a complaint with the Office of Personnel Management is absurd and an insult to his widow. The *Bush* decision, 103 Sup. Ct. 2404 (1983), does not preclude the recognitin of this remedy, it compels it, because of the simple, yet inescapable difference that Bush was able to pursue

administrative claims. In both *Bush* and *Gremillion v. Chivatero*, 749 F.2d 246 (5 Cir 1985), the plaintiffs were alive to pursue alternative remedies. All such administrative avenues were foreclosed to Mr. and Mrs. Palermo when the devastating success of the defendant's wrongful conduct resulted in his suicide.

The crucial rationale underlying the Fifth Circuit's decision to extend absolute immunity in this case, the existence of alternative remedies, is seriously in error. Neither the deceased not his widow posses any such rights as are described in the opinion of the court below. This is a critical distinction ignored by the Court of Appeals. It should not be overlooked by this Honorable Court.

b. There Is No Reason to Distinguish Between Assaults Which Cause Non-Fatal Injury and Intentional Emotional Torts Which Result in Wrongful Death in Deciding Whether Absolute or Qualified Immunity Applies.

There is no logic and certainly no justice in recognizing a remedy when a federal supervisory official exceeds the limits of his proper authority over a subordinate, in the case of a non-fatal physical assault, while denying it when a malicious emotional tort causes a wrongful death. The Fifth Circuit has not justified such a distinction in the instant case. The court in *Palermo* chose not to apply its own standards in *Dretar* by refusing to extend the remedy beyond what the circuit describes as a very limited class of claims for actual physical batteries to "less tangible" assaults of emotional distress. Again, however, the rationale is the alleged existence of "exhaustive administrative avenues" which are in fact wholly unavailable to the decedent and his survivors. 806 F.2d 1272.

The result which the court below has reached is reiniscent of the period in our admiralty law before the recognition of a federal maritime wrongful death remedy. Then, it was literally true that it was better for a shipowner to kill rather than merely injure a seaman, because the former case was not actionable, while the latter was. In this case, had the defendants struck Mr. Palermo and broken his arm or leg, they could be made to personally account for their actions. But by the Fifth's rule, this is not possible even if they have killed him.

The rationale for denying a remedy in this case may turn on other more important factors. But the issue of whether or not a remedy will lie for a federal employee killed as a consequence of another federal employee's wrongful conduct should not be decided by whether or not there was a physical assault.

c. Absolute Immunity Should Not Be Extended Beyond The Very Limited Category of Government Officials Now Entitled To The Defense.

In *Mitchell v. Forsyth, supra*, this court held that the Attorney General of the United States was not absolutely immune from suit for damages arising out unconstitutional conduct in the performance of national security functions. 105 S.Ct. 2812. This court declined to extend absolute immunity beyond judges, prosecutors, witnesses and officials performing quasi-judicial functions.

This court found a qualified immunity defense and the creation of an interlocutory right of appeal to a defendant, who is unsuccessful in winning summary judgment on such a defense, is more than adequate safeguard to protect federal officials from spurious claims and the burden of unnecessary trials. Those principals apply equally well here.

In *Bush v. Lucas* absolute immunity was extended to a potentially vast range of federal employees. The *Bush* decision addressed similar issues to those presented by this case in the context of the federal employment situation because, in *Bush,* there was no physical assault. As shown below, the Circuit Courts have not since found a consistent approach to resolving the issue of absolute versus qualified immunity.

This much, however, is certain. Mr. Bush was alive to pursue his administrative claims, which he did successfully. Mrs. Palermo has no such remedies available as Bush had, either for herself, or on behalf of her deceased husband. Her sole recourse is an action for damages. Neither Mr. nor Mrs. Palermo could pursue a claim for wrongful death before this cause of action accrued.

The Fifth Circuit has improperly applied *Bush* to the facts of this case and extended absolute immunity to a class of torts and to a category of federal supervisory employees who neither require, nor merit this kind of protection.

2. There is a Conflict in the Circuits Resulting in Unequal Protection of the Law. Some Circuits Grant Qualified Immunity While the Fifth Circuit Grants Absolute Immunity.

There is a conflict in the Circuit Courts over the applicability of the defense of absolute immunity. The Third, Eighth, Ninth and District of Columbia Circuits would appear to recognize the cause of action sought herein and grant only qualified immunity to the defendants. *Araujo v. Welch,* 742 F.2d 805 (3rd Cir. 1984); *Bishop v. Tice,* 622 F2d 349

(8th Cir. 1980); *Otto v. Heckler,* 781 F2d 754 (9th Cir. 1986); *McKinney v. Whitfield,* 736 F2d 766 (C.A.D.C. 1984). The Fifth Circuit has expressed its disagreement with *Araujo* and *McKinney. Palermo v. Rorex,* 806 F2d 1273; *Dretar v. Smith,* 752 F2d 1018.

The Fifth Circuit did not address the *Bishop v. Tice* or *Otto v. Heckler* decisions in its opinion. The conflict allows for the disparate treatment of persons who are victims of torts of this kind and should be resolved by this Honorable Court.

CONCLUSION

The court should grant the petition so that it may review the important issues of absolute immunity for federal employees in a case of wrongful death where no alternative remedies are available and thus, no special factors counsel hesitation in the recognition of a remedy. This court should resolve the conflict which has arisin in the Circuits over the issue of the scope of absolute immunity following its decision in *Bush v. Locas.*

Respectfully submitted,
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APPENDIX A

Carolyn King PALERMO,
Plaintiff-Appellant,

v.

Dewayne ROREX, Jack Chivatero and
Charles Hoyle, Defendants-Appellees.

No. 85-3127

United States Court of Appeals,
Fifth Circuit.

Jan. 5, 1987.

Widow of Internal Revenue Service employee who committed suicide filed actions against her husband's supervisors. Following removal and consolidation, the United States District Court for the Eastern District of Louisiana, Adrian G. Duplantier, J., denied motion to remand tort action to state court and dismissed complaints. Widow appealed. The Court of Appeals, Hinojosa, District Judge, sitting by designation, held that: (1) state court action could be removed without certification that defendants were acting within scope of their employment, and supervisors' acts which allegedly led to employee's suicide clearly were performed under color of federal office in satisfaction of more general removal statute; (2) widow had not stated Fifth Amendment due process claim for which relief could be granted, and special federal employer-

employee relationship counselled hestitation in formulation of remedies in addition to those that were available through grievance procedure; and (3) widow's claim for intentional infliction of emotional distress also failed, as supervisors were absolutely immune from tort liability for their acts, which were clearly within the scope of their employment.

Affirmed.

Before RANDALL and WILLIAMS, Circuit Judges and HINOJOSA,* District Judge.

HINOJOSA, District Judge:

FACTS AND PROCEEDINGS BELOW

Appellant Carolyn King Palermo (Plaintiff beow, hereinafter Appellant) brought two separate actions seeking monetary damages agains Appellees Dewayne Rorex, Jack Chivatero and Charles Hoyle (Defendants below, hereinafter Appellees or Rorex, Chivatero, or Hoyle, respectively if referred to individually). Appellees are all employees of the Internal Revenue Service, an agency of the federal government (hereinafter IRS). One action was brought in the Civil District Court for the Parish of Orleans, State of Louisiana and the other in the Federal District Court for the Eastern District of Louisiana. The state court action was removed to the federal district court and consolidated with the federal action.

The thrust of Appellant's Complaints, which are virtually indentical in both suits, is that the Appellees who were her husband Dwayne Joseph Palermo's (hereinafter Mr. Palermo) supervisors in the IRS wrongfully commenced disciplinary proceeding against Mr. Palermo with the

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* District Judge of the Southern District of Texas, sitting by designation.

intention of inflicting mental and emotional distress on him, and that such actions caused or contributed to Mr. Palermo;s committing suicide. The state court action alleged such conduct was tortious, while the federal court action alleged such conduct constituted cruel and unusual punishment and violated Mr. Palermo's due process rights. The district court denied the Appellant's Motion to Remand the common law tort suit to the state court and granted the Appellees' Motion to Dismiss the Complaints pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a cause of action. The facts as alleged in Appellant's Complaints are as stated beow.

In February, 1980, Mr. Palermo, an employee of the IRS, was told by Rorex that he was being "rotated" to a different position, for the limnited period of twelve months, for administrative purposes. Mr. Palermo understood that he would be permitted to return to his original position. However, he was never "rotated"back to his previous position.

Apparently Mr. Palermo as a result of the transfer and other job related pressures developed emotional and psychological problems and suffered a nervous breakdown and was hospitalized in January 1983.

Rorex brought desciplinary action against Mr. Palermo in April 1983, for conduct related to his breakdown and in the same month Mr. Palermo was again hospitalized for his emotional problems. Although Mr. Palermo's psychiatrist advised Rorex and his supervisors of the seriousness of Mr. Palermo's mental illness, Rorex informed Mr. Palermo that he would be subject to disciplinary action if he attempted to return to work.

Mr. Palermo sought disability retirement on July 2, 1983, but was denied disability in August of that year. As a result of the denial of disability, Mr. Palermo returned to work. Upon his return to work, Rorex, Chivatero and Hoyle reinstated disciplinary actions against him. As a part of the disciplinary action, Mr. Palermo was subject to a downgrade of his position with the IRS. Although he sought to take a voluntary downgrade, Mr. Palermo was not permitted to do so and was instead given a disciplinary downgrade. Mr. Palermo committed suicide on October 3, 1983.

On the above alleged facts Appellant stated in her federal Complaint that such action by the Appellees constituted cruel and unusual punishment, violated due process, and constituted malicious administrative prosecu-

tion, while in the state court action she alleged that said actions resulted in the "wrongful death" of her husband. In each Complaint she sought monetary damages ($2 million in the state court and $6 million in the federal action).

This proceeding is one in which Appellant appeals the district court's actions denying her Motion to Remand the state court action and the granting of the Motion to Dismiss the Complaints for failure to state a cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6).

I

[1] Appellant argues that the district court erred in denying her Motion to Remand on the grounds that the stsate court action should not have been removed without certification from the Attorney General that the Appellees were acting within the scope of their employment pursuant to 28 U.S.C. § 2679(d). Appellant further argues that no such certification could have been made because the acts alleged in the petition were malicious and so could not be within the scope of Appellees' employment with the federal government.

Appellees assert that removal was proper pursuant to 28 U.S.C. § 1442 in that the Defendants were all employees of the IRS, an agency of the federal government. Appellees relied upon the allegations in the Complaints to show that the acts complained of were within the scope of their employment.

Appellant's argumnent that 28 U.S.C. § 2679(d) controls is incorrect. Said section deals with the removal of actions brought against federal employees pursuant to the

Federal Tort Claims Act. 28 U.S.C. §§ 1346 and 2671, *et seq.;* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3727, p. 452 (1985). Since this action was not brought under the Federal Tort Claims Act removal was properly considered under the more general removal statute for federal officers, 28 U.S.C. § 1442.

The Supreme Court of the United States has interpreted Title 28 Section 1442, in *Willingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969). In holding that removal by the Warden and chief medical officer at a federal penitentiary was proper under this statute, the Court stated:

> ... the right of removal under § 1442(a)(1) is made absolute whenever a suit in a state court is for any act "under color" of federal office, regardless of whether the suit could originally have been brought in a federal court. Federal jurisdiction rests on a 'federal interest in the matter' ..., the very basic interest in the enforcement of federal law through federal officials. *Id.* at 395 U.S. 406, 89 S.Ct. at 1815 (citation omitted).

Professors Wright, Miller and Cooper noted that, in *Willingham*, "[i]t was sufficient that the acts charged occurred in the course of a continuing relationship between the plaintiff and the federal officer during the latter's performance of his duties...." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3727, pp. 450-451 (1985).

In the instatnt case, there can be no doubt that the acts alleged in the Complaints were performed "under color

of federal office." The state court Complaint specifically alleges that the actions complained of were connected with Mr. Palermo's status as an employee of the IRS.

The acts alleged include the imposition of disciplinary actions against Mr. Palermo by Rorex, failing to assist Mr. Palermo by means of employee counseling, denying him access to the Troubled Employee Program, and failing to assist him in seeking agency disability. Each act alleged confirms the "continuing relationship" that Plaintiff and Defendant Rorex had at the IRS. The Complaint further alleged that "Mr. Rorex acted upon the authority consent and approval of defendants Jack Chivatero and Charles Hoyle, his supervisors." The words "authority," "consent," and "approval" themselves confirm the assertion that all acts were sanctioned by the IRS. The "under color" test could not be more clearly satisfied.

Appellant also claims that, because the Appellees are sued in their individual rather than official capacities and the acts are alleged to have been maliciously motivated, the Defendants could not have been acting "under color of federal office." A similar argument was rejected in *Willingham, supra.* In discussing the need for a "'causal connection' between the charged conduct and asserted official authority." *Id.* at 409, 89 S.Ct. at 1817, the Court found that it is sufficient that the only contact between the parties was while at their place of federal employment, while performing their duties. The Court went on to explain:

> If the question raised is whether they [the appellees] were engaged in some kind of "frolic on their own" in relation to respondent [appellant], then they should have the opportunity to present their version of the facts to a federal, not a state

> court. This is exactly what the removal statute was designed to accomplish. *Id.*, 409, 89 S.Ct. at 1817.

Based upon this Court's application of the *Willingham* test, we find that the state action was properly removed pursuant to Section 1442(a)(1) and the district court was correct in denying the Motion to Remand.

II

Appellant's more substantive, if not well founded, argument is that the District Court erred in granting Appellees' Motion to Dismiss the Complaints for failure to state a claim for which relief can be granted. As stated the state Complaint asserted the common law tort claims of intentional infliction of emotional distress and gross negligence in Appellees' conduct as Mr. Palermo's supervisors resulting in Mr. Palermo's "wrongful death" while the federal Complaint alleged the same actions but asserted constitutional violations of the Fifth Amendment protection against deprivation of life, liberty or property without due process of law and the Eighth Amendment protection against cruel and unusual punishment.

[2] For purposes of review of a dismissal for failure to state a claim for which relief may be granted, Appellant's allegations must be taken as true. *Miller v. Stanmore,* 636 F.2d 986 (5th Cir. 1981); *see Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (allegations "construed favorably to pleader"); Committee Notes, 1946 Amendment (1985); Wright & Miller, *Federal Practice and Procedure: Civil* § 1357, fn. 46 (1969).

[3] Assuming, as we must, that Appellant's constitutional allegations are correct, she has still stated no claim for which relief could be granted. Appellant's Fifth Amendment due process claim is apparently based upon the "taking" of Mr. Palermo's life without due process of law. Although this claim would be difficult to prove, we accept, for purposes of this appeal, that the actions taken by the Appellees caused Mr. Palermo to take his own life. The question thus becomes whether this Court should fashion a remedy for this wrong.

The Court is mindful that there was an extensive grievance procedure established by the Office of Personnel Management, available to Mr. Palermo to assert his Complaints. 5 C.F.R. §§ 771.201-771.304. As the Supreme Court pointed out in *Bush v. Lucas*, 462 U.S. 367, 386, 103 S.Ct. 2404, 2415, 76 L.Ed.2d 648 (1983), "constitutional challenges to agency action ... are fully cognizable within this system [now, Office of Personnel Management's grievance provisions]." Mr. Palermo could have raised his claims in an administrative procedure.

The Supreme Court has determined that the Constitution itself may be the sole basis for a private cause of action against a federal official. *Bivens v. Six UnKnown Fed. Narcotic Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). However, in *Carlson v. Green*, 446 U.S. 14, 18, 100 S.Ct. 1468, 1471, 64 L.Ed.2d 15 (1979), the Supreme Court noted that a *Bivens* cause of action could be defeated where:

> the defendants demonstrate special factors counselling hesitation in the absence of affirmative action by Congress, [or]
>
> when defendants show that Congress has

> provided an alternative remedy which for recovery directly under the Constitution and viewed as equally effective. (citing *Bivens, supra,* at 396-399 [91 S.Ct. at 2004-06] and *Davis v. Passman,* 442 U.S. 288, 245-247 [99 S.Ct. 2264, 2277-78, 60 L.Ed.2d 846] (1979))

The Court applied these possible exceptions to a *Bivens* action in *Bush v. Lucas, supra.*

As in the instant action, *Bush* was one in which a federal employee complained of a violation of his constitutional rights [1] by his supervisor. The *Bush* Court rephrased the question which *Bivens* and *Carlson,* first addressed as follows:

> The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. *Bush v. Lucas,* 462 U.S. 367, 388 [103 S.Ct. 2404, 2416, 76 L.Ed.2d 648] (1983).

The Court went on to answer that question in the negative. The Supreme Court found that the special nature of the federal employer-employee relationship constitutes a "special factor counseling hesitation" in formulating

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[1] The claim in *Bush* was one for the imposition of disciplinary action for the federal employee's exercise of his First Amendment right to free speech. Appellant tried to distinguish *Bush* on the basis of the nature of the constitutional tort alleged. For purposes of this decision, this Court can find no reason the constitutional violation alleged should alter the sound guidance provided in *Bush,* The Court, in *Gremillion v.*

additional constitutional remedies.

This Circuit has applied the holding in *Bush* to a case very similar to the instant one. In *Gremillion v. Chivatero,* 749 F.2d 276 (5th Cir. 1985), an IRS employee sued for First and Fifth Amendment violations, claiming he was unlawfully discharged for exercising his right of free speech. Like Appellant's argument here, the appellant in *Gremillion* attempted to distinguish *Bush* on the grounds that the test should be different where malicious or intentional acts are alleged. This argument was explicitly rejected in *Gremillion.*

The issue in Appellant's case is not whether the acts were malicious but rather, even assuming a violation of the employee's constitutional rights, whether the *Court* should supplement the available administrative remedies with the creation of a remedy based upon the constitutional violation at issue. In this highly regulated area of federal employment, where Congress has created exhaustive administrative avenues for employee disputes, there are those very strong "special factors counselling hesitation" preventing us from creating a *Bivens*-type constitutional remedy for violations of employees constituional rights arising in and from the employment context.

Appellant argues that a different result should obtain where the administrative remedies available will not allow complete recovery. This argument was rejected in

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(footnote 1 continued)
Chivatero, 749 F.2d 276 (5th Cir. 1985), applied the same reasoning in *Bush* to a Fifth Amendment claim for a taking of property, citing an Eleventh Circuit opinion, *Gleason v. Malcom,* 718 F.2d 1044 (11th Cir. 1983), for the proposition that the constitutional basis for the violation is immaterial to these actions.

Bush and *Carlson*. Although both petitioners in those decisions argued the inadequacy of the available remedies, the Supreme Court twice considered only the test as established in *Bivens, supra*, and *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). As these cases so clearly indicate, such factors are more properly considered by Congress in furtherance of "federal personnel policy," than by the Courts. *Bush v. Lucas, supra*, 467 U.S. at 380-381, 103 S.Ct. at 2412-13.

[4] The analysis of "special factors counseling hesitation" could also be applied to Appellant's Eight Amendment claim. However, Appellant's Eighth Amendment claim is so patently frivolous, we need not here consider whether such special factors exist. The cruel and unusual punishment clause of the Eighth Amendment applies only in criminal actions, following a conviction. *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); *Thiboduaux v. Bordelon*, 740 F.2d 329 (5th Cir. 1984). There are no allegations in either the state or federal Complaints which, even when read in Appellant's favor as generously as is feasible could possibly support an Eighth Amendment claim. The case was not a criminal case and Mr. Palermo was not convicted of a crime.

Having concluded that Appellant's constitutional claims should have been dismissed, the final question is whether Appellant stated a common law tort claim for which relief could be granted. The district court found that all actions alleged in the Complaint were within the scope of Appellees' employment as Mr. Palermo's supervisors and thus were shielded from liability for common law torts.

The Supreme Court has established that federal

officials are absolutely immune for common law torts taken "within the outer perimeter of petitioner's line of duty. . .," *Barr v. Matteo,* 360 U.S. 564, 575, 79 S.Ct. 1335, 1341, 3 L.Ed.2d 1434 (1959). The fact that appellant had alleged malice is of no consequence:

> The claim of an unworthy purpose does not destroy the privilege.... The privilege would be of little value if they [federal officials] could be subjected to the cost and inconveniense and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. *Barr v. Matteo,* 360 U.S. at 575, 79 S.Ct. at 1341 (citing *Tenney v. Brandhove,* 341 U.S. 367, 377, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951)).

Appellant relies upon an opinion of this Circuit interpreting the limits of absolute immunity for federal officials in actions involving battery. In *Dretar v. Smith,* 752 F.2d 1015 (5th Cir. 1985) this Court held that:

> [t]he individual citizen's interest to be protected from physical force by federal official outweighs the public's interest in shielding government officials from defending damage suits brought on account of action taken in exercise of their official responsibilities when the battery by the federal official 'cause[s] severe injuries, [is] grossly disproportionate to the need for action under the circumstances, and [is] inspired by malice.' *Id* at 1017 (quoting *Shillingford v. Holmes,* 634 F.2d 263, 265 (5th Cir. 1981)).

Appellant attempts to bring the actions alleged in her Complaints within this very narrowly defined exemption from absolute immunity.

This Court declines to read *Dretar* to apply not only to a very strickly limited class of actual physical batteries as defined in that case but also to less tangible intentional inflictions of emotional distress. To open the floodgates to actions by every public employee for emotional distress for every administrative action taken by a federal official would surely contradict the reasoning in *Barr* wherein the Court weighed two countervailing interests as follows:

> ...on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities. *Barr v. Matteo,* 360 U.S. 564, 565, 79 S.Ct. 1335, 1336, 3 L.Ed.2d 1434.

The Court in *Barr* clearly felt that the balance should be struck in favor of the public interest in an effective government, with its officials free from threats of suits for actions within the scope of their employment.

[5] The question thus becomes whether the actions taken by Appellees were within "the outer perimeter of the scope of their employment." The allegations in Appellant's Complaints, if taken as true, show only that Rorex, with the knowledge and approval of his supervisors, Chivatero and Hoyle, imposed one transfer for administrative purposes, various disciplinary actions or threatened actions, and failed to enroll Mr. Palermo in a Troubled Employee Program. Every one of these actions, or inactions, were a direct result of Appellees' supervisory roles over Mr.

Palermo. Few actions could be closer to the center of the scope of Appellees' employment as supervisors, and certainly do not begin to test the perimeters.

Appellant argues that this Circuit should adopt the holdings of the Courts of Appeals for the District of Columbia, in *McKinney v. Whitfield*, 736 F.2d 766 (D.C.Cir.1984), and the Third Circuit, in *Araujo v. Welch*, 742 F.2d 802 (3rd Cir.1984). Appellant's reliance upon these cases is misplaced for several reasons. This Court has already rejected the holdings in both *McKinney* and *Araujo* in *Dretar, supra* by stating:

> We cannot accept the *Araujo* and *McKinney* courts' reasoning or conclusion that the absolute immunity does not extend to *any* battery committed by a federal desk employee because we believe that the *Araujo* and *McKinney* courts misapprehended the nature of the considerations at stake in absolute immunity cases. *Dretar*, 752 F.2d at 1018.

As the Court pointed out *Araujo* and *McKinney* focused on the nature of the tort alleged, rather than the overall conduct of the federal employee as is counselled in *Barr*. In addition, the *Araujo* and *McKinney* opinions give short shrift to the considerations outlined in *Barr* with respect to protecting government officials and the great interest of Congress and the Executive in what has been termed "federal personnel policy."*Dretar* at 1018, *See Bush v Lucas, supra*, 467 U.S. at 380-381, 103 S.Ct. at 2412-13.

All actions alleged by Appellant are clearly within the boundaries of the scope of Appellees' employment with the federal government. Appellees are entitled to absolute

immunity for all common law torts within the scope of their employment.

Therefore, Appellant has failed to state either constitutional or common law tort claims for which relief could be granted and the District Court was correct in dismissing the Complaint for failure to state a cause of action.

The district court's denial of Appellant's Motion to Remand and dismissal of Appellant's Complaints are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT OF LOUISIANA

FILED FEB 14 1985

CAROLYN KING PALERMO	CIVIL ACTION
VERSUS	NO. 84-4786
DEWAYNE ROEX, JACK CHIVATERO, CHARLES HOYLE	"SECTION "H"

CONSOLIDATE WITH:

CAROLYN KING PALERMO	CIVIL ACTION
VERSUS	NO. 84-4990
DWAYNE ROEX, JACK CHIVATERO, CHARLES HOYLE	SECTION "H'

JUDGMENT

The court having granted the motion of defendants to dismiss;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, Dewayne Roex, Jack Chivatero, and Charles Hoyle, and against plaintiff, Carolyn King Palermo, dismissing plaintiff's suit at her cost.

New Orleans, Louisiana, this 14th day of February, 1985.

UNITED STATES DISTRICT JUDGE

DATE OF ENTRY FEB 14 1985

APPENDIX C

Received
FEB 19

IN THE UNITED STSATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3127

CAROLYN KING PALERMO, FILED
Feb 17 1987
Plaintiff-Appellant

versus

DEWAYNE ROREX, ET AL.,

Defendants-Appellees.

Appeal from the United States Distsrict Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion January 5, 5 Cir., 1987,_____F.2d____)

(FEBRUARY 17, 1987)

Before RANDALL, WILLIAMS, Circuit Judges and HINOJOSA, District Judge*

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* District Judge of the Eastern District of Louisiana sitting by designation.

PER CURIAM:

(X) The Petition for Rehearing is Denied and no member of this panel nor Judge in regular active service on the Court having requestsed that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestsion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/S/Illegible

UNITED STATES CIRCUIT JUDGE REHG-6

(2)

Supreme Court, U.S.
FILED
SEP 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1838

In the Supreme Court of the United States

OCTOBER TERM, 1987

CAROLYN KING PALERMO, PETITIONER

v.

DEWAYNE REX, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

9PP

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1838

CAROLYN KING PALERMO, PETITIONER

v.

DEWAYNE REX, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the district court erred in dismissing her suits seeking damages from federal officials for their involvement in allegedly unconstitutional and tortious personnel actions directed at her husband, a federal employee who was supervised by respondents.

1. Petitioner brought two separate damages actions against respondents, alleging that their actions contributed to the death of her husband, a former IRS employee. Petitioner filed one complaint in Louisiana state court, in the Civil District Court for the Parish of Orleans. She filed the other complaint in the United States District Court for the Eastern District of Louisiana. The state court action subsequently was removed to federal court and consolidated with the federal action. Pet. App. A3.

The gravamen of the complaints, which are virtually identical, is that respondents, who were Mr. Palermo's supervisors at the IRS,[1] wrongfully commenced discipli-

[1] DeWayne Rorex was the Chief, Collection Division, Jack Chivatero was a District Director, and Charles Hoyle was an Assistant District Director.

nary proceedings against him with the intention of inflicting mental and emotional distress. The complaints further alleged that these actions caused or contributed to Palermo's suicide on October 3, 1983. The state court action alleged that respondents' conduct was tortious; the federal court action alleged that respondents had violated Palermo's constitutional rights to due process and to be free from cruel and unusual punishment. Pet. App. A3-A4.

The particular allegations of the complaints were as follows: In February 1980, respondent Rorex told Palermo that he was being "rotated" to a different position within the IRS and that the "rotation" would last only 12 months. Palermo understood that at the end of that time period he would be permitted to return to his original position. However, Palermo was never "rotated" back to his previous position. Apparently as a result of the transfer and other job-related pressures, Palermo developed emotional and psychological problems, suffered a nervous breakdown, and was hospitalized. Pet. App. A4-A5.

The complaints further alleged: In April 1983, Rorex brought a disciplinary action against Palermo for conduct related to his breakdown. In that same month, Palermo again was hospitalized for his emotional problems. Subsequently, although respondents were advised by Palermo's psychiatrist of the seriousness of Palermo's mental illness, Rorex informed Palermo that disciplinary action would be taken against him if he attempted to return to work. On July 2, 1983, Palermo applied for disability retirement; that request was denied in August 1983. Palermo then returned to work, and in September 1983 respondents reinstated the disciplinary action against Palermo; they requested that Palermo be given a disciplinary downgrade and did not accede to his request to take a voluntary downgrade. Palermo committed suicide on October 3, 1983. Pet. App. A5.

2. The district court granted respondents' motion to dismiss the complaints. At the hearing on that motion, the court explained orally that it was dismissing the suits because "in this case * * * there is an exercise in the judgment of the employer/employee relationship * * * [and] I'm satisfied that the two cases [*Bush* v. *Lucas*, 462 U.S. 367 (1983), and *Gremillion* v. *Chivatero*, 749 F.2d 276 (5th Cir. 1985)] preclude the claim * * *." (II R. 7-8).

The court of appeals affirmed (Pet. App. A3-A17). Accepting arguendo the truth of the allegations of the complaints, the court held that petitioner had failed to state a claim for which relief could be granted. The court explained that in *Bush* v. *Lucas*, 462 U.S. 367 (1983), this Court had recognized that the special nature of the federal employer-employee relationship counselled against the creation of an additional constitutional remedy. The court concluded (Pet. App. A12): "In this highly regulated area of federal employment, where Congress has created exhaustive administrative avenues for employee disputes, there are those very strong 'special factors counselling hesitation' preventing us from creating a *Bivens*-type constitutional remedy for violations of employees['] constitutional rights arising in and from the employment context."[2]

Relying on *Barr* v. *Matteo*, 360 U.S. 564 (1959), the court of appeals rejected petitioner's state law tort claim. The court held that respondents were absolutely immune from liability for the common-law torts alleged in the state court complaint because all of the actions complained of in that suit came within the scope of respondents' employment as Palermo's supervisors. Pet. App. A13-A16. The

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[2] The court found that petitioner's Eighth Amendment claim was "patently frivolous," because the prohibition against cruel and unusual punishment "applies only in criminal actions, following a conviction" (Pet. App. A13).

court distinguished *Dretar* v. *Smith*, 752 F.2d 1015 (5th Cir. 1985), where the court of appeals had stated that absolute immunity was not available in a case where the defendant was charged with commiting a severe and maliciously-inspired physical battery. The court stated that to extend its statement regarding a physical battery to "less tangible intentional inflictions of emotional distresss" would "open the floodgates to actions by every public employee for emotional distress for every administrative action taken by a federal official[, which] would surely contradict the reasoning in *Barr* [v. *Matteo, supra*]" (Pet. App. A15).

3. Petitioner contends that the court of appeals erred in holding that *Bush* v. *Lucas, supra,* required rejection of her attempt to bring a nonstatutory suit for damages based on alleged constitutional violations. In *Bush*, this Court held that a federal employee could not bring such an action against his superiors based on the allegation that his dismissal was the product of unconstitutional conduct. The Court explained (462 U.S. at 368): "Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, * * * it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Bush* controls this case.[3]

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[3] We note that, quite apart from the impact of *Bush*, it is clear that petitioner has not stated a claim for relief. Even if a nonstatutory damages action were available here in appropriate circumstances, it is not apparent that petitioner could bring such a suit to recover damages for alleged violations of her husband's constitutional rights. More importantly, it is plain that such a suit would have no chance of success in this case, even if all the allegations of petitioner's complaints are true. As the court of appeals noted, petitioner's Eighth Amendment claim is frivolous. And, because respondents are accused of doing no more than pursuing a disciplinary proceeding against Palermo through the normal procedural channels, it is difficult to see how they could have violated any due process rights of his, much less

Petitioner appears to recognize that *Bush* would be directly on point if Palermo were alive. The thrust of petitioner's contention, as we understand it, is that now that Palermo is dead, and can no longer pursue a reinstatement remedy, a constitutional suit for damages must be permitted (see Pet. 6-7). But his death does not alter the fact that Congress has prescribed procedures for remedying improper dismissals or demotions of federal employees, even if the claim is constitutionally based, and that this Court has determined that those remedies are not to be supplemented by a nonstatutory action for damages. The death of a federal employee cannot suddenly make appropriate the availability of such a damage suit, particularly when it is his own actions that have deprived him of administrative remedies made available by Congress. Here, as the court of appeals recognized (see Pet. App. A12-A13), petitioner's claim that Palermo's suicide was caused by respondents' allegedly unconstitutional personnel decisons seeks an element of damages for which Congress has not provided a remedy. But this Court in *Bush* specifically held that the fact that the administrative remedies Congress has provided do not allow complete recovery is not enough to warrant importing a nonstatutory remedy into the federal employment arena (see 462 U.S. at 372, 388), and that holding is dispositive here.[4]

4. Petitioner asserts (Pet. 9-10) that the Court should grant certiorari here to resolve a conflict in the circuits regarding the scope of *Barr* v. *Matteo, supra*. The decision below, however, does not even arguably conflict with any of the decisions cited by petitioner.

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have committed the violation of "clearly established * * * constitutional rights" that would have to be shown in order to overcome their qualified immunity. See, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 524 (1985).

[4] To the extent Palermo's death was a result of his federal employment, petitioner may have a claim for benefits under the Federal Employees Compensation Act, 5 U.S.C. 8101 *et seq.* We understand that petitioner has filed such a claim, which is now pending before the

It is true that the Fifth Circuit stated on an earlier occasion (*Dretar* v. *Smith*, 752 F.2d at 1018), and reiterated here (Pet. App. A16), that it disagrees with the courts that have stated that there can never be an absolute immunity defense to an allegation of battery. Compare *Araujo* v. *Welch*, 742 F.2d 802 (3d Cir. 1984); *McKinney* v. *Whitfield*, 736 F.2d 766 (D.C. Cir. 1984). But that issue is not involved here, where there is no allegation that respondents committed a battery upon Palermo. Rather, the alleged tort is intentional infliction of emotional distress, which the court in *Araujo* specifically held to be subject to an absolute immunity defense (742 F.2d at 806). All of the cases relied upon by petitioner simply hold that the defendant's conduct in those cases, such as battery or sexual harassment, exceeded the "outer perimeter of [their] line of duty" (*Barr* v. *Matteo*, 360 U.S. at 575 (plurality opinion)). That clearly was not the case here, where the only allegations made against the respondents are that they transferred Palermo to a different job and commenced a disciplinary action against him within the proper procedural channels. In the words of the court of appeals, "[f]ew actions could be closer to the center of the scope of [respondents'] employment as supervisors, and [they] certainly do not begin to test the perimeters" (Pet. App. A16). There is no reason whatsoever to believe that any other court of appeals would have denied an absolute immunity defense for this conduct on the ground that it exceeded the "outer perimeter" of the scope of respondents' employment.[5]

Employees' Compensation Appeals Board of the Department of Labor (ECAB Docket No. 87-731; OWCP File No. A7-187400).

[5] Petitioner does not dispute that respondents were of sufficient rank in the federal hierarchy, and had sufficient responsibility, to be entitled, under *Barr* v. *Matteo*, *supra*, to invoke absolute immunity in appropriate circumstances. Nor, we submit, would petitioner have had a persuasive basis for claiming otherwise, in light of the considerable discretion that each of the respondents must exercise in the course of his duties. There is, accordingly, no need for the Court to

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1987

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hold this case pending the decision in *Westfall* v. *Erwin*, cert. granted, No. 86-714 (Mar. 2, 1987), which involves the question of the type of employee that is entitled to the absolute immunity defense.

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